

# THE REVOLUTION IN THE SENATE



SENATOR  
ROBERT  
L. OWEN.  
WHO WAS  
ACTIVE  
IN PASSING  
CLOTURE  
RULE

**Need of Cloture**  
By THEODORE E. BURTON,  
Formerly United States Senator  
from Ohio.

THE fate of the resolution in the Senate at the close of the last session for the protection of our shipping has led to the adoption of a provision for cloture. The new rule which seems to have the approval of a majority of the members provides that on a request made by sixteen Senators for the early disposition of a measure a motion shall be presented on the second day thereafter for its consideration, and if on a two-thirds vote it shall be made the unfinished business it must be discussed to the exclusion of everything else, no Senator being allowed to speak more than an hour.

This is by no means so radical a rule as others which have been proposed. It does not compare with the established procedure in the House, under which, on the adoption of a so-called "rule," a measure may be submitted to vote after a few hours debate, and in some cases no amendment is allowed.

It is nevertheless a departure from the methods in vogue in the Senate since the very beginning of the Government. The country has justly condemned the course of those who obstructed the passage of a resolution giving in affirmative and unequivocal terms authority to the President to maintain American rights on the seas. The disastrous results of the failure of this resolution are greater than at first sight would appear, even if it is conceded that the President has such authority without affirmative action by Congress.

From the very beginning of the war there has been a feeling among the nation engaged in the conflict that a pacifist element either dominates in this country or else is so strong as to embarrass us in the taking of vigorous measures. The failure of this resolution adds to this impression and encourages the belligerents to further disregard our rights and, in brief, we are humiliated as a nation.

In view of the very natural indignation which arises from the course of a few Senators there is an almost universal demand for a change in the rule. Nevertheless I am constrained to say that I do not believe the abolition of the right of unlimited debate in the Senate will promote any more helpful legislation. It is a matter of plain experience that in all legislative bodies there is danger that under the influence of excitement or the domination of a tyrannical majority hasty and ill advised action is taken.

In the early consideration of measures by legislative bodies it is probable that selfish interests, well organized and alert, will first be heard from, or that the noisiest and least responsible will have an undue influence. Two elementary principles were equally in mind when our nation was framed. It is essential that they be observed in all popular governments: First—The people should rule. Second—The will of the people should be deliberately expressed.

The Senate was intended to be a bulwark against precipitate and ill-considered action and to postpone revolutionary changes until the new propositions were shown to be better than the existing order of things and the views of all the varied elements of our population could be heard.

failed. This emergency currency act not only acted as a safeguard in the years from 1908 to 1914, but saved the country from a disastrous panic in the summer and autumn of 1914.

On the other hand, there are instances of successful filibusters where a majority vote in both houses of Congress had demanded the passage of a measure which eventually failed of enactment, and the filibuster thereafter gained the approval of the people. One instance is the so-called force bill, which passed the House of Representatives in 1890 but was defeated by a filibuster in the Senate in the following winter. While there is a wide difference of opinion on this measure, it must be conceded now, even by those who voted for it, that its passage would have created an excessive degree of irritation and would have met with widespread disapproval.

Another instance was the filibuster against the so-called river and harbor act in the year 1914. In this latter case many members of the Senate felt compelled to vote for the bill if it came to vote because of local demands for it, while their individual judgment was opposed to its passage. The sentiment of the country overwhelmingly approved this filibuster.

In fact, the only instance in which an organized movement by a small number of Senators can succeed is such a case as that which occurred just recently, namely, near the end of a session when the Congress expresses its opinion on a legislative measure. In such a case, had the measure providing for the arming of ships been introduced at an earlier date, it would no doubt have been enacted.

Another objection to cloture rule in the Senate is that it disturbs the balance which has existed among the three departments—legislative, executive and judicial. With a cloture rule it would be possible for a forceful Executive, because of his prestige and control of patronage, arbitrarily to force through measures which are not demanded by a majority of the people and which tend to diminish the power and responsibility of Congress.

It cannot be denied that there has been a marked tendency in recent years to lower the standing of legislative bodies in our scheme of government. The President or executive in a State is the one person upon whom the eyes of the people are centered. What he says is always widely published; he is looked upon as the leader of his party and as President he very properly is regarded as the leader in national affairs, and in crises like the present should have the support of all loyal citizens irrespective of party.

In times of emergency, such as a foreign war, support should be given to him ungrudgingly which at other times would be denied. The executive thus has an advantage in the very nature of his position. In addition, constituencies are very much at fault in that they often demand of their representatives in the House and Senate the promotion of local interests to the detriment of the general welfare.

I firmly believe that Representatives and Senators exaggerate the attention which they ought to give to their individual constituencies. In the long run the voters to whom they represent appreciate common honesty and regard for the whole country more than the accomplishment of results that involve mere local considerations.

The adoption of a rule for limited debate will no doubt diminish the power and standing of the Senate, as is of course offensive to realize that a small coterie in the Senate or House can defeat the best aspirations of the whole people, but generally speaking the widespread condemnation which is sure to be visited upon those who thus defeat the popular will is a sufficient

check against the unjustifiable obstruction of public business.

The recent instance is probably the most glaring and offensive of any attempt at obstruction in the whole history of the Senate. The query arises, however, whether an exceptional case like this ought to furnish the basis for a general rule.

A reasonable compromise could be afforded by the establishment of a rule that in foreign relations and questions which involve national emergency the rule of unlimited debate should be set aside. These questions should be above and beyond party considerations. In many of them very prompt action is absolutely essential and the head of the nation should be given a degree of authority which at other times is not at all necessary. Perhaps, however, it is best to try the method of cloture at least for a time. A popular demand such as now exists can be best satisfied by a trial.

It must be remarked that even if the proposed rule had been in effect, it would probably have been in the power of obstructing Senators to defeat the passage of the recent resolution. In the first place, there would have been an interval of two days after the request of the sixteen Senators specified by the rule before a motion could have been adopted making the resolution unfinished business, and after that an hour's time would have been allowed for each Senator who so desired to express himself. Still further in the legislative jam due to the pendency of many measures of the utmost importance it would have been difficult to give undivided attention to this resolution. Under the rules of the Senate, consideration can be given to a conference report at any time and a plurality of measures were about to be reported by Conference Committees.

In this connection I cannot forbear to say that I think it unlikely that any measure should be voted upon by members who have been named as having part in the defeat of the resolution. Some of them had no part in anything having the semblance of a filibuster, but merely desired modifications on which they had a right to vote as their individual conscience might dictate.

## Limitations of Cloture

By JOHN W. GRIGGS,  
Attorney-General in the Cabinet of  
President McKinley and formerly  
Governor of New Jersey.

WITH the life and safety of the Government involved, the action of the filibustering Senators was an outrage. There can be no excuse for it, nor justification. It was unpatriotic for them to block legislation that had been demanded by the people, the President; that had been voted on by the House of Representatives, and was approved by the majority of the Senate.

Because their action was made possible by an abuse of the Senate's right to unlimited debate it was natural that there should be a demand for the cloture rule from those thwarted. It was in the order of things that Senators who signed the manifesto should be eager to prevent a repetition of the situation.

However, I do not believe that the blocking of the bill for the arming of vessels should compel a general cloture. In my opinion its operation should be limited to those measures that involve the defense of the country, the safety of the Government in anticipation of war or in war time. The cloture should be invoked only when the vital interest of the country demands it.

There are many matters that come under Senate discussion to which the cloture should not apply. These are partisan affairs, and the cloture gives an undesirable weapon to the party in power. In times of stress such as we are now facing partisanship is forgotten. The cloture, then, in operation would block the efforts of any such

small group as blocked the bill just before Congress adjournment.

Filibusters are not altogether evil things. There are four successful ones that occur to me at this time, that on the force bill, the one made by Senator Burton on the rivers and harbors bill, that on the shipping bill and that on the armed ship bill. With the exception of the last I believe the country has been benefited by the defeat of the bills.

These filibusters would not have prevailed if a cloture rule had been in force in the Senate. Hence, while the change in the rules seems a necessity now, it should be applied with discretion.

Since 1870 this amendment has been the stumbling block to all attempts at cloture in the Senate. It is as follows: "1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

"2. The Congress shall have power to enforce the provisions of this article by appropriate legislation."

At no other time in the history of the United States has the country been called upon to witness a spectacle such as the last days of the late Congress exhibited. Never before has the privilege of unlimited debate in the Senate, either through threat or execution, been used to hamper the will of a majority on an issue involving the foreign affairs of the Government. Never before has the club been swung over the majority when the President of the United States has pleaded international relations as a reason for the passage of desired legislation. And never before has a President felt himself called upon openly to enlist the support of the country in forcing a change in the rules of the Senate with a view to limiting debate in that body.

Because of this parliamentary tradition in the Senate and out are loath to discuss the question from an academic position. They point merely to the broad principle that a parliamentary body is bound only by its own judgment in considering rules for its own conduct. In an unpublished work upon Senate rules and precedents prepared for the secretary of the Senate, Henry H. Gilroy, for many years the Senate parliamentarian and in that capacity a veteran of the fight over cloture involved in the force bill, declares: "Rules are as necessary to parliamentary bodies for their normal life and continuance as the circulation of the blood is for the health of the human body. They build themselves up gradually into a code and are founded on the highest rights and soundest sense."

Rules may be said to be greater than the statutes, in that they govern the body that makes statutes and are specifically enjoined by the Constitution of the United States. The courts may declare laws unconstitutional and inoperative, but as the rules are formulated and established for the government of legislative bodies in all

their proceedings it is beyond the power of the courts to nullify or make them ineffectual.

"The Constitution of the United States in express terms gives the Senate exclusive power to make its own rules, and this power is supreme, and no other power is granted that in any way can control this high privilege given to the Senate. It may make, unmake or change its own rules, but when once adopted they are binding until repealed or changed."

"Story on 'The Constitution,' in Vol. 1, sec. 837, says: "No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation or order. The humblest assembly of men is understood to possess this order, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory unless it were coupled with a power to punish for disorderly behavior or disobedience of those rules."

Discussing previous attempts to write the present question into Senate rules Mr. Gilroy said to a correspondent of THE SUN in Washington: "The previous question, during the time between its adoption, April 16, 1878, and its omission in the new code of rules, March 26, 1906, was invoked but four times, being ruled out of order one of these times. Vice-President Jefferson in the first session of the Sixth Congress ruled 'that the previous question is not in order upon an amendment to a bill.' It thus appears that the Senators in the early sessions of the Senate had little admiration for the present question, but since it was so seldom called for.

"After the rule was omitted from the revised rules in 1906 no propositions were presented for its incorporation into the rules until the Thirty-first Congress, first session, when Senator A. D. Douglass submitted a resolution to amend the rules to restore the previous question, but it was not agreed to."

"Many similar propositions following that time were presented by Senators, but none of them were made a part of the rules of the Senate. The only change in the Senate rules accomplished since 1906 which concerns the limitation of debate involved the adoption of Rule 8, by which debate on appropriation bills by unanimous consent may be limited to five minutes."

"Only once in the history of the Senate prior to the present rule had a previous question or cloture rule been reported to the Senate by one of its members. On December 10, 1883, the chairman of the Committee on Rules, Senator Frye of Maine, reported a general revision of the rules, which was amended and agreed to, and which was accompanied by a report, two hundred copies of which were ordered printed."

"This was an exhaustive report, having the original rules, amendments and the rules reported for adoption printed in it. This revision included Rule 22 for the previous question. Amendments adopted in the Senate struck out the rule, and there is no record of debate on the subject. Moreover, except for a speech by Senator Cockrell of Missouri, opposing the cloture proposals in connection with the force bill, there would be no record of the rule, since all copies of the report apparently were collected and destroyed."

Rule 22 as proposed in the Frye report is almost identical in its general provisions with the rule proposed thirty-four years earlier by Stephen A. Douglass, and with the rule proposed by Senator Nelson W. Aldrich as a means of getting the force bill through the Senate in 1890. It provided for cloture by a majority and limited amendments to those pending when the previous question was moved.

The net result of an almost continuous fight in favor of the limiting

International Film Service.

their proceedings it is beyond the power of the courts to nullify or make them ineffectual.

"The Constitution of the United States in express terms gives the Senate exclusive power to make its own rules, and this power is supreme, and no other power is granted that in any way can control this high privilege given to the Senate. It may make, unmake or change its own rules, but when once adopted they are binding until repealed or changed."

"Story on 'The Constitution,' in Vol. 1, sec. 837, says: "No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation or order. The humblest assembly of men is understood to possess this order, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory unless it were coupled with a power to punish for disorderly behavior or disobedience of those rules."

Discussing previous attempts to write the present question into Senate rules Mr. Gilroy said to a correspondent of THE SUN in Washington: "The previous question, during the time between its adoption, April 16, 1878, and its omission in the new code of rules, March 26, 1906, was invoked but four times, being ruled out of order one of these times. Vice-President Jefferson in the first session of the Sixth Congress ruled 'that the previous question is not in order upon an amendment to a bill.' It thus appears that the Senators in the early sessions of the Senate had little admiration for the present question, but since it was so seldom called for.

"After the rule was omitted from the revised rules in 1906 no propositions were presented for its incorporation into the rules until the Thirty-first Congress, first session, when Senator A. D. Douglass submitted a resolution to amend the rules to restore the previous question, but it was not agreed to."

"Many similar propositions following that time were presented by Senators, but none of them were made a part of the rules of the Senate. The only change in the Senate rules accomplished since 1906 which concerns the limitation of debate involved the adoption of Rule 8, by which debate on appropriation bills by unanimous consent may be limited to five minutes."

"Only once in the history of the Senate prior to the present rule had a previous question or cloture rule been reported to the Senate by one of its members. On December 10, 1883, the chairman of the Committee on Rules, Senator Frye of Maine, reported a general revision of the rules, which was amended and agreed to, and which was accompanied by a report, two hundred copies of which were ordered printed."

"This was an exhaustive report, having the original rules, amendments and the rules reported for adoption printed in it. This revision included Rule 22 for the previous question. Amendments adopted in the Senate struck out the rule, and there is no record of debate on the subject. Moreover, except for a speech by Senator Cockrell of Missouri, opposing the cloture proposals in connection with the force bill, there would be no record of the rule, since all copies of the report apparently were collected and destroyed."

Rule 22 as proposed in the Frye report is almost identical in its general provisions with the rule proposed thirty-four years earlier by Stephen A. Douglass, and with the rule proposed by Senator Nelson W. Aldrich as a means of getting the force bill through the Senate in 1890. It provided for cloture by a majority and limited amendments to those pending when the previous question was moved.

The net result of an almost continuous fight in favor of the limiting

of debate in the Senate from the time of Henry Clay to the adoption of the rule last Thursday was the adoption in 1872 of the five minute rule on appropriation bills, which provided, however, "and no amendment to any such bill making legislative provisions other than such as directly relate to the appropriations directly contained in the bill shall be received." Thus the possibility of passing legislation affecting Southern elections by a limitation on debate was eliminated. On this amendment the vote was 33 to 13.

Nearly eleven months later the Senate defeated, by a vote of 30 to 25, a resolution instructing the select committee on the revision of the rules to consider and report on a previous question and other proposed changes in the rules. The following day Mr. Wright amended his resolution to limit the putting of the previous question to cases in which it was ordered by a two-thirds majority. This was not satisfactory to opponents of cloture, however, and the resolution was ordered passed over, apparently without a roll call.

In September, 1890, Senator Aldrich offered his resolution amending the rules by permitting the previous question, with a limitation of debate thereafter to thirty minutes for each Senator, and providing for votes and discussions only upon pending amendments, a majority of the Senators present to determine whether to close debate. On five test votes the Aldrich resolution commanded narrow majorities, but it was found impossible to carry the proposed amendment to a final vote owing to a filibuster which merged into the filibuster on the force bill.

Threat of cloture after the previous question had been dropped from the rules in the revision of 1890, when Senator Henry Clay was attempting to force through the Senate the loan bill, which met with the third filibuster that year in the Senate. The Senate Journal quotes Mr. Clay indirectly on this point as follows:

"But as he had indicated in anticipation, to put the matter beyond doubt, he (Mr. Clay) would have the Senate to know that he would resort to the Constitution and act on the rights insured in it to the majority by passing a measure that would insure the conduct of business of the Senate to the majority."

"He recollected once meeting one of the most intelligent and truly sensible men it had ever been his good fortune to know, and he was struck with a remarkable saying of his; it was that he considered it utterly impossible for a man, he did not care what his genius was, to speak sensibly or usefully on any topic for more than a quarter of an hour."

Senator King asked the Kentucky leader if he latter intended to introduce a gag law.

"Mr. Clay, I will, sir, I will."

Mr. King—I tell the Senator then that he may make his arrangements at his boarding house for the winter. That threat to filibuster against proposed cloture was repeated many times in the Senate, and only the pressure of a President backed by a tremendous public sentiment prevented its repetition in the brief debate Wednesday.

Senator Hoar of Massachusetts was generally credited with the authorship of the cloture resolution advanced in behalf of the force bill by Senator Aldrich in 1890. The Aldrich resolution, however, was not as stringent as the rule proposed by Senator Hoar, and that it provided "and the question shall be put upon the amendments, if any, then pending," while the Hoar rule had provided that the previous question, once ordered by a majority vote, should be put "upon pending amendments, upon amendments upon which notice shall then be given, etc."

Debate on the resolution developed one of the most heated parliamentary struggles in the history of the Senate, and the language employed against the filibusters against the force bill was quite as intemperate as that resulting from the defeat by a few Senators of the President's armed ships measure last week.

"Mr. President," said Senator Hoar,

"the Senate has other duties besides the mere talking, as I think the American people by this time very thoroughly understand and believe, and one is that the work which the Senate is here for is not to talk but to legislate. That is the one constitutional purpose of the creation of the Senate."

"If I may be pardoned one other sentence, I say that an attempt to defeat lawmaking in this country by the processes of long debate and of taking up time, the attempt which we have seen in this very session, is as much a conspiracy against the Constitution and the constitutional liberty and the national authority of the American people as was the rebel Congress that met at Richmond."

This statement, greeted with applause from floor and galleries, threw the Senate into such confusion that it was several minutes before the presiding officer was able to restore order and induce the several Senators who had risen to their feet in anger at the attack upon their patriotism to return to their seats.

In replying Senator Cockrell read an article written the previous year for the *Youth's Companion* by Senator Hoar, discussing the United States Senate and particularly the freedom of debate in that body.

"I have no space here to explain," Senator Hoar had written, "what I have fully explained elsewhere, how this provision, coupled with the previous question in the House, gives the privilege of fullest discussion and amendment of these great bills [appropriation bills] in the Senate, while, as they are finally shaped, the House passes them, not only without discussion and amendment, but even in ignorance of what they contain."

In the same article Senator Hoar wrote: "If any citizen be disposed to be impatient under this restraint upon the will of the majority, let them remember that it was in this way that our fathers had the foundation of our Government below the frost."

Debate on the force bill and the cloture rule combined ran through thirty-five days in the Senate, six of which were devoted to the rule, and in the end the measure was displaced and ultimately lost, along with the Aldrich rule.

The Senate battle over the force bill and cloture was preceded in the House by the bitterest fight over rules in the history of that body, commencing with the counting of a quorum physically present by Speaker Reed, and concluding with the adoption of a new set of rules authorizing this procedure and the refusal of the Speaker to entertain dilatory motions.

Statements were made by two of the ablest parliamentarians and legislative generals in the House, Representative William McKinley of Ohio and Speaker Thomas B. Reed of Maine. Concluding his remarks in defense of Mr. Reed's action in counting a quorum, Mr. McKinley said:

"It is about time, Mr. Speaker, to stop these legal fictions. Let us be honest with each other and with the country; let us defeat bills in a constitutional way, if we can, or not at all; give freedom of debate, opportunity of amendment, the yea and nay vote, by which our judgment and that of every Representative can be expressed, and responsibility fixed where it belongs, and we will preserve our self-respect, the honor of the Constitution of the country we have sworn to obey, and serve the people whose trusts we hold."

"Why, this controversy is to determine whether a majority shall rule and govern or be subject to the tyranny of a minority. Talk about the tyranny of the majority! The tyranny of the minority is infinitely more odious and intolerable and more to be feared than that of the majority."

"I say we have settled one question—settled it, I trust, for all time; settled it at a good deal of cost; it is true—that the minority cannot run this Government; and we intend, if we can, under the Constitution and the laws, in broad daylight and in the presence of 60,000,000 people whose deliberate judgment we invite upon our acts to-day, to determine whether the constitutional majority legally chosen to this House shall do the business of this House."

Defending his arbitrary rulings which

Continued on Fourth Page.